TORRES *v.* LOTHROP, LUCE & COMPANY.

APPEAL FROM AND IN ERROR TO THE SUPREME COURT OF PORTO RICO.

No. 17. Argued October 31, 1913.—Decided December 1, 1913.

The due process clause of the Federal Constitution does not control mere forms of procedure provided only the fundamental requirements of notice and opportunity to defend are afforded. *Louisville & Nashville R. R. Co.* v. *Schmidt*, 177 U. S. 230.

Where the appellate court is without authority to consider errors of the trial court, which were not there assigned, this court cannot reverse the appellate court for error in not deciding matters which it had no authority to pass on.

Although proceeds of a crop received by a mortgagee of the land may by law be imputed to payment of interest on the mortgage and not to other advances, they may, under a special contract with the mortgagor and by his subsequent acquiescence, be applied to payment of advances instead of interest.

In the absence of clear conviction of error, this court follows the conclusions of the court below in applying the local law.

One who has transferred his mortgaged premises by deed recorded prior to the foreclosure suit cannot set the foreclosure aside on the ground

whether before or after does not appear, Torres sold the property to Alvarado for a small sum in cash and a large amount secured by mortgage and this deed of sale was put upon the registry before any cautionary notice of the suit was, or could have been recorded. Conformably to law, the court ordered a demand made upon Torres notifying him of the suit and calling upon him to pay the debt within thirty days, in default of which, the property would be sold. Although he was served with this notice, Torres ostensibly took no heed of the proceedings, but Alvarado as the registered owner of the property filed a petition to enjoin the foreclosure proceedings on grounds which, although they are not fully set out in the record, it is conceded were substantially identical with those here relied upon. No injunction was granted and the suit having been twice called for hearing, was dismissed for want of prosecution. An order for the seizure of the property was in due season awarded by the court, as was also another order stating the amount of the debt and directing the sale of the property. It was seized, advertised and sold by the marshal and bought in by one Rosaly, who assumed the mortgage sued upon in the foreclosure proceedings and paid a small cash price. It then developed that the deed to Alvarado which was on the records was an insurmountable obstacle to the completion of the purchase made by Rosaly under the foreclosure and in those proceedings he began what was tantamount to an hypothecary action against Alvarado as a third possessor to compel him to pay the mortgage debt or cancel the inscription of his deed of purchase. Alvarado appeared in these proceedings, admitted that he could not pay the mortgage debt and could not hold the property unless he did, that he had brought his suit to enjoin and had intentionally abandoned the same and consented to the erasure of the inscription of his deed of sale. This being done, the marshal made a deed to Rosaly in confirmation of the

foreclosure sale, which was duly inscribed. Subsequently, Rosaly having given a mortgage in favor of the firm of De Ford, Luce & Company who were the successors in right of De Ford & Company, by legal proceedings obtained an erasure of the inscription of the Torres mortgage which he, Rosaly, had assumed at the foreclosure sale on the ground that the same had been discharged.

A little more than a year after, that is, on the twentieth of April, 1907, Torres and Alvarado, in a notarial act, rescinded the sale which had apparently taken place between them, it being recited in the act that the rescission was the result of an agreement which had taken place between the parties in 1905 and that it was caused by the refusal of the wife of Alvarado to join in the mortgage which was given by him in the deed of sale.

Eight months afterwards, as we have seen, in January, 1908, Torres commenced this suit upon the general grounds which we have at the outset outlined. The assignments of error which are relied upon to reverse the judgment, affirming the action of the trial court, in dismissing the suit, are nineteen in number. While we think their inherent weakness is apparent from the facts which we have just stated, we briefly notice them.

1st. The summary or executory process provided by the mortgage law, which was followed in foreclosing the Torres mortgage, it is insisted was so deficient in notice or so wanting in opportunity to defend as to cause that law to be repugnant to the due process clause of the Constitution of the United States. Without pausing to apply the elementary doctrine that the due process clause does not control the mere forms of procedure provided only the fundamental requirements of notice and opportunity to defend are afforded (*Louisville & Nashville Railroad Co.* v. *Schmidt*, 177 U. S. 230), and without stopping to indicate how clearly these fundamental rights were provided for as demonstrated by the facts which we have enumerated, we

think it suffices to say that it does not appear that the contention of want of due process was urged either upon the trial court, or was assigned as error in the court below, or was passed upon by that court. And as in its opinion in this case concerning another subject the court below pointed out that it was without authority to consider errors complained of which were not presented to the trial court, it follows that in any view, it could not be held that the court below erred in deciding a matter which it did not decide and which it had no authority to pass upon.

2nd. It is contended that the ninth clause of the act of mortgage of 1901 was mandatory and prohibited the firm of De Ford & Company from advancing to Torres, at his request, money to make his crop for the year 1904, and therefore such advances were not properly chargeable against the proceeds of the crop and hence the interest was paid because the whole proceeds of the crop, if so imputed, disregarding the advances, would have been adequate to have paid the interest. But we think the court below was right in refusing to sustain this fictitious payment of interest or to uphold the construction of the contract upon which it was based. We concur with the court below that the contract did not exclude the right of the firm to advance to Torres at his request, sums to aid him in making a crop and thus to enable him to carry out instead of disregarding the letter and the spirit of the contract. This view, of course, disposes of the contention that error was committed in admitting proof of the agreement to make the advances and of their receipt by Torres and his acquiescence in and approval of the accounts which were rendered him on the subject.

3rd. It is urged, although Torres was fully informed of the institution of the foreclosure proceedings by the demand made upon him under the order of court, conformably to the mortgage law, and had the opportunity to defend afforded by that law, nevertheless the proceedings

were void because no copy of the petition of foreclosure and citation, as provided by the Code of Civil Procedure in ordinary cases, was issued and served. The contention is based upon the proposition that the Code of Procedure in force at the time the suit to foreclose was brought to the extent that it directed service of citation and summons in ordinary cases was cumulative and applicable to proceedings under the mortgage law, because not incompatible with such law. But construing and applying the local law the court below held that this contention was without merit, a conclusion which we follow in the absence of a clear conviction that error was committed, which is far from being the case, and because in any event, for reasons which we shall hereafter state, the contention was additionally without merit.

4th. We group under this paragraph all the other errors relied upon, specifying only those which we consider of importance: *a*, That the wife of Torres as a widow in community was not made a party defendant in the foreclosure suit; *b*, that the notes secured by the mortgage were not annexed to the petition to foreclose or filed therewith; *c*, that the order of the court directing the notice of demand was signed only by two out of the three judges composing the court, and by an attorney at law who was then acting as judge because of the recusation of a member of the court; *d*, because the act of mortgage did not contain a specification of value or appraisement for the purposes of foreclosure; *e*, because of an asserted defect in the advertisement which preceded the sale; *f*, because of the absence from the foreclosure record of the order finding the amount due and directing its payment. The court disposed of all these objections separately upon considerations of local law which we see no reason to reverse, but which we do not refer to in detail, because, in addition it held them all untenable upon a general and we think, conclusive ground to which we refer.

It is not challenged, as pointed out by the court, that under the law of Porto Rico the state of the public record as to title is the dominant factor controlling proceedings for the foreclosure of a mortgage and therefore that the one in whose name a property stands, recorded upon the public records, is the essential party to a proceeding to foreclose. Nothing could better illustrate the correctness of these propositions than do the proceedings in this case, since in consequence of the existence of the registry of the title in Alvarado, resulting from the sale made to him by Torres, the foreclosure proceedings against Torres and the judicial sale thereunder were inefficacious to transmute the title and it became essential for Rosaly, the purchaser at such sale, to commence proceedings to enforce the mortgage as against Alvarado as a third possessor. Applying these principles the court held, in view of the existence of the record title in Alvarado, of his suit to restrain the foreclosure proceeding and its dismissal for want of prosecution, of the steps taken against him as a third possessor and his admissions on the subject and consent to the erasure of the inscription of his title, that the foreclosure proceedings were binding and it was not open to Torres who so far as the record was concerned had parted with his title, to assail them on the grounds which we have stated. The correctness of the premise and of the conclusion itself abstractly considered is not denied, but it is insisted that they are here inapplicable because the sale made by Torres to Alvarado was a mere fiction or simulation and one of the matters complained of which we have not specified is that error was committed in refusing to permit proof of the simulation.

The court below, however, considered and disposed of the alleged distinction in so conclusive and succinct a manner that we adopt and place our own conclusion upon it:

"Alvarado was the record owner and the ostensible

owner. He not only had a duly recorded public document in his favor, but he had begun a suit similar to the present one and this course of action was inconsistent with the possession by anyone else.

"The appellant complains that the court erred in not permitting him to show that the conveyance made from Torres Zayas to Alvarado was fictitious or simulated and that the real party in interest was always Torres Zayas. We cannot see that the court committed an error in refusing to admit such testimony; at most Alvarado would have to be considered as the agent or representative of Torres Zayas and the maxim *qui facit per alium facit per se* may be held to apply. The registry system in Porto Rico exists to apprise purchasers and others who are the true owners of property, and if a man after treating with the apparent owner, may still have his title impugned by a secret agreement existing between such record owner and the alleged true owner there would be no security in the acquisition of property."

Affirmed.